Nos. 87-1979 and 88-127

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In the Supreme Court of the United States

OCTOBER TERM, 1988

CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE

NORFOLK AND WESTERN RAILWAY COMPANY, PETITIONER

v.

ROBERT T. GOODE, JR.

ON WRITS OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether "employee[s]" engaged in "maritime employment" under Section 2(3) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 902(3) (1982 & Supp. IV 1986), include not only those workers who actually load or unload cargo but also all workers on a covered site who perform work that is an essential element or integral part of the process of loading or unloading.

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INTEREST OF THE UNITED STATES

The Secretary of Labor, through the Department of Labor's Office of Workers' Compensation Programs (OWCP), administers the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*[1] The Director of the OWCP is a party to and may participate in any proceedings under the Act. These cases

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[1] The Longshoremen's and Harbor Workers' Compensation Act was retitled by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 27(d)(1), 98 Stat. 1654.

require the Court to determine the scope of the employee status requirement for coverage set forth in Section 2(3) of the LHWCA, 33 U.S.C. 902(3) (1982 & Supp. IV 1986). As indicated in our brief filed at the Court's invitation at the petition stage, resolution of the issue will affect federal policy concerning coverage provided by the Act and will implicate the Secretary's administration of the Act. The United States therefore has a substantial interest in this case.

STATEMENT

1. Petitioners, Chesapeake and Ohio Railway Company (C&O) and Norfolk and Western Railway Company (N&W), operate coal loading terminals in the Hampton Roads area of Virginia. C&O's terminal abuts the James River (87-1979 Pet. 7), while N&W's facility, known as Lambert's Point, adjoins the Elizabeth River (88-127 Pet. 7). Petitioners' freight trains transport coal mined inland for loading onto ships docked at the terminals' piers. Upon arrival, the coal-laden railway cars remain in the terminals' "barney" yards until the shiploading process begins. J.A. 35. The process of loading coal into ships' holds is highly mechanized and, in all material respects, identical at both petitioners' terminals. When shiploading begins, railway cars move one-by-one from the barney yards and onto "dumpers" at the land end of the piers. A mechanical device called a "retarder" stops each loaded coal car at the correct position on the dumper. Next, other mechanical devices lift and rotate the car, so that its contents drop through a hopper to conveyor belts that feed the coal directly onto the waiting ships. After unloading, the cars roll back to the terminals' holding yards, from which they are eventually sent inland. Barring mechanical failure or other incident, the coal loading process is con-

tinous from the time a car leaves the barney yard until it returns, empty, to the holding yard. J.A. 21, 35; 87-1979 Pet. 7-9; 88-127 Pet. 8-9.

The respondents in No. 87-1979, Nancy J. Schwalb and William McGlone, were laborers employed by C&O to perform general cleaning at its terminal. Though each had varied duties, they both were frequently required, during the actual shiploading process, to clear away coal that spilled from the conveyor belts and the "trunnion rollers," the devices at the ends of the dumper that enable it to rotate suspended railway cars. Failure to clear away this "trash coal" results in malfunction of the shiploading equipment, thus halting the loading process. J.A. 21, 29, 30-31; 87-1979 Pet. 9. While Schwalb and McGlone easily could have replaced the trash coal on the conveyor belts, applicable union agreements prohibited them from doing so; rather, laborers from a different department performed that task. J.A. 21; 87-1979 Pet. 9-10; 87-1979 Br. in Opp. 5.

The respondent in No. 88-127, Robert J. Goode, Jr., was a machinist for N&W who worked in the Motive Power Department at Lambert's Point.[2] That department's function was to maintain and operate the coal facility, with machinists in the Department devoting the majority of their time to maintaining and repairing loading equipment and machines. J.A. 35-37.

Schwalb sustained a serious head injury on January 11, 1983, when she fell while walking to clear trash coal from the trunnion rollers. 87-1979 Pet. 10-11; 87-1979 Br. in Opp. 2. McGlone was injured on February 1, 1983, as he was attempting to clear away trash coal beneath a moving

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[2] N&W employs machinists throughout its rail system, assigning them to different sites and different jobs on the basis of seniority. J.A. 35-36; 88-127 Br. in Opp. 5-6.

conveyor belt. 87-1979 Pet. 10; 87-1979 Br. in Opp. 3. Goode was injured on February 11, 1985, while repairing the retarder located on one of the dumpers at Lampert's Point. 88-127 Pet. 9-10; N&W Br. in Opp. 2-3. Each respondent brought a timely action under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, in the appropriate circuit court of Virginia. J.A. 20-21; N&W Br. in Opp. 2. C&O filed special pleas to the courts' jurisdiction, contending that the respondents' exclusive remedy was under the LHWCA, 33 U.S.C. 901 *et seq.* N&W moved to dismiss on the same basis. J.A. 28-29, 30, 34-35.[3]

2. The courts for the Third Judicial Circuit (*McGlone*), Fourth Judicial Circuit (*Goode*), and Seventh Judicial Circuit (*Schwalb*) of Virginia each decided that the LHWCA applied to respondents' claims, sustained petitioners' jurisdictional challenges, and dismissed the FELA actions. J.A. 40-42, 34-35. In each case, the court found no serious dispute that the respondents satisfied the LHWCA's "situs" requirement by working in a statutorily covered geographical area (J.A. 28-29, 31, 38-39), and thus focused principally on whether the respondents were "employee[s]" as defined by Section 2(3) of the Act, 33 U.S.C. 902(3) (1982 & Supp. IV 1986).

In resolving this issue of employee status, the circuit courts in the *McGlone* and *Goode* cases explicitly acknowledged a conflict between the restrictive approach to the question that the Virginia Supreme Court followed

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[3] FELA makes "common carrier[s] by railroad" liable in damages to their employees for work-related injuries occurring as a result of employer negligence, and confers concurrent jurisdiction over claims under the Act on state and federal courts. 45 U.S.C. 52, 56. As this Court long ago recognized, however, the LHWCA is the exclusive remedy for railroad workers who are injured while engaged in maritime employment. *Nogueira* v. *New York, N.H. & H.R.R.*, 281 U.S. 128, 136-138 (1930).

in *White* v. *Norfolk & W. Ry.*, 217 Va. 823, 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977), and the more expansive standard adopted by the federal courts of appeals in such decisions as *Price* v. *Norfolk & W. Ry.*, 618 F.2d 1059 (4th Cir. 1980). J.A. 31-33, 37-38. The courts viewed the Virginia Supreme Court's *White* standard as confining LHWCA coverage to only those workers on the situs who were "directly involved" in the loading of cargo. J.A. 31-32, 37-38. By contrast, the courts believed, the prevailing standard among the federal courts of appeals is considerably broader, encompassing all workers on the situs whose jobs comprise "an essential element in the loading and unloading of the vessels." J.A. 32, 38. As the *McGlone* court interpreted it, the federal standard does not require an employee to be involved "in the actual loading of ships," if the maintenance work the employee performed "was essential to the movement of maritime cargo." J.A. 32. The *McGlone* and *Goode* courts resolved this conflict between state and federal court interpretations against adherence to the Virginia Supreme Court's test; in their view, following *White* "would be to interpret a Federal law contrary to all of the decisions of the Federal courts" (J.A. 33), and the test formulated by the federal courts was, in fact, the proper test. J.A. 38.

Applying the federal courts' status test, the Virginia circuit courts concluded that the LHWCA covered the respondents because they performed tasks essential to the loading of coal at petitioners' terminals. McGlone's cleaning duties were essential because the failure to clear away coal that had fallen from the belts "would eventually interfere with the loading operation and bring it to a halt." J.A. 31. Similarly, Schwalb's cleaning duties conferred LHWCA coverage because "if the spilled coal was not removed * * * it could have haulted [*sic*] the process of loading the coal aboard the vessels." J.A. 29. And Goode

was an employee under the LHWCA because he maintained and repaired equipment and machines "directly and solely related to the loading and unloading operation" (J.A. 37), and was thus "involved in the essential elements of loading and unloading" (J.A. 36-37, citing *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 423 (1985)).[4]

3. The Supreme Court of Virginia consolidated Schwalb's and McGlone's appeals and reversed. J.A. 20-27. The court acknowledged that the United States Court of Appeals for the Fourth Circuit had applied the LHWCA to a painter who did not actually handle cargo but who had maintenance duties essential to the "entire [loading] process" (J.A. 24-25 (quoting *Price*, 618 F.2d at 1062 n.4)), and agreed here that the failure to remove "trash coal" could interrupt that process. J.A. 21. But the Virginia court rejected the *Price* court's reasoning and conclusion (J.A. 24-27), refused to adopt the "overall process" standard, and adhered instead to the restrictive test set out in *White*. J.A. 26-27. Under that test, the court held, workers must show that their " 'own work and employment' " bears " 'a realistically significant relationship' to 'traditional maritime activity involving navigation and commerce on navigable waters,' " to bring themselves within the LHWCA. J.A. 23-24, quoting *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976). Reading this Court's "essential elements of [loading or] unloading" language in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), to limit LHWCA coverage only to those employees

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[4] The circuit court in *Goode*, explicitly concluding that the federal standard should prevail over the State's *White* standard to the extent that the standards differed, held in the alternative that the activities of Goode qualified him for coverage under the *White* test as well. J.A. 37.

actually "engaged in the handling of cargo" (J.A. 25, quoting 432 U.S. at 267), the Virginia Supreme Court concluded that "the [*Northeast Marine Terminal*] 'essential elements' standard is more nearly akin to the [*White*] 'significant relationship' standard * * * than [to] the 'overall process' construction." J.A. 26. Without considering how essential their duties were to the overall loading process, the court held that since Schwalb and McGlone performed "purely housekeeping and janitorial tasks," they "were not statutory employees as defined in the LHWCA." *Ibid.* Application of the *White* test thus required reversal of the circuit courts' judgments. Subsequently, relying on its opinion in *Schwalb*, the Supreme Court of Virginia reversed the judgment in *Goode* as well. J.A. 46.[3]

SUMMARY OF ARGUMENT

1. The Supreme Court of Virginia erroneously construed Section 2(3), 33 U.S.C. 902(3), of the LHWCA to require that workers be directly involved in the physical process of loading or unloading cargo in order to qualify as employees under the Act. Congress defined "employee"

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[3] The Court did not consider, as an independent ground on which it could sustain the lower court's holding, the fact that Goode's duties as a pier mechanic at times involved work "over the water" (88-127 Br. in Opp. 6; J.A. 191, 195), and that such work therefore may have qualified Goode as a covered employee under *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977) (post-1972 LHWCA meant to cover "amphibious workers" or those who spent "at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity") and *Director, OWCP* v. *Perini North River Assocs.*, 459 U.S. 297, 311-312 (1983) (workers injured on navigable waters before 1972 were covered under LHWCA without regard to duties performed; post-1972 Act covers all who were previously covered).

to mean "any person engaged in maritime employment." The breadth of the statutory language suggests that courts should take an expansive view of the LHWCA's extended coverage, to include any worker who performs work that is an essential element or integral part of the cargo-handling process. Moreover, the remedial purposes of the 1972 amendments, which amended Section 2(3) to eliminate disparities in benefits due to the location of injuries and to adapt the Act's coverage to the realities of modern shipping practices, demand a liberal construction of the status requirement. The legislative history of the 1984 amendments to the LHWCA further confirms the propriety of reading the status provision broadly. These amendments specifically exclude from coverage certain narrow categories of employees whose connection to maritime employment is considerably more tenuous than that of respondents here. Even as to these exclusions, however, Congress precluded LHWCA coverage only if the workers involved were eligible for benefits under state workers' compensation schemes.

2. The state court's standard also conflicts with the principles of coverage enunciated by this Court and followed by the lower federal courts and the Benefits Review Board. This Court has explicitly admonished that the Act's status provision should be interpreted broadly and in functional terms, so that the Act achieves its objective of providing uniform coverage for those engaged in longshoring and related jobs. Thus, this Court has found coverage for an employee whose work was an integral part of the unloading process as altered by the advent of new technology, and for a terminal laborer who spent only some of his time in indisputably longshoring operations. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977). Similarly, the Court has found coverage for two land-based workers who did not load or unload material

directly to or from ships, but who nonetheless were responsible for some portion of the loading and unloading activity and thus performed tasks that were an integral part of the overall process of loading or unloading cargo. *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979). In so doing, the Court has rejected distinctions in coverage on the basis of union labels, the "point of rest" theory, or similar restrictions created by employer assignment policies, because they would artificially curtail the functional analysis required by the Act.

Consistently with these decisions, the courts of appeals and the Benefits Review Board have uniformly viewed the question whether employees are engaged in "longshoring" and thus have status under the Act by focusing on the nexus between a worker's actual duties and the overall process of loading and unloading cargo. Employing this functional approach, the courts of appeals and the Board have extended LHWCA coverage to any employee on a covered situs who, like respondents, performs duties that comprise an "essential element" or "integral part" of the overall loading and unloading process, even if those duties do not themselves include physically or mechanically handling maritime cargo. The court below erred in rejecting this approach and in limiting the Act's coverage to only that considerably smaller class of employees who have a direct involvement with the physical process of loading and unloading cargo.

3. Finally, the state court's restrictive interpretation of landward coverage under the LHWCA conflicts with the Department of Labor's interpretation of the Section 2(3) status requirement, an interpretation the Department has consistently applied since 1972 in administering the LHWCA workers' compensation program. Because that interpretation is based on a permissible construction of the statute, it is entitled to deference and should be given effect.

ARGUMENT

"EMPLOYEES" ENGAGED IN "MARITIME EMPLOYMENT" INCLUDE ALL WORKERS ON A COVERED SITUS WHO PERFORM WORK THAT IS AN ESSENTIAL ELEMENT OR INTEGRAL PART OF THE PROCESS OF LOADING OR UNLOADING

A. The Broad Language And The Legislative History Of The LHWCA's Status Provision Require An Expansive View Of The Act's Coverage

1. The language and legislative history of the 1972 amendments indicate that they provide broader coverage of land-based workers than that identified by the Supreme Court of Virginia. Congress amended the Act in an attempt to conclude a long saga of jurisdictional disputes over the coverage of the LHWCA.[6] In particular, Con-

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[6] That saga, frequently revisited by this Court, began with this Court's determination in *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205 (1917), that a State was without power to extend workers' compensation to a worker injured on a gangplank between a wharf and a vessel lying in navigable waters. According to the Court, such state action threatened the "uniformity in respect to maritime matters" that the admiralty clause of the Constitution was meant to ensure (*id.* at 217); the Court consequently struck down two subsequent attempts by Congress to delegate the power to provide workers' compensation for maritime injuries to the States. See *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920); *Washington* v. *W.C. Dawson & Co.*, 264 U.S. 219 (1924). In response, Congress in 1927 enacted the LHWCA, which provided federal compensation to workers injured on the seaward side of the "*Jensen* line," but only "if recovery • • • [could] not validly be provided by State law." The Longshoremen's and Harbor Workers' Compensation Act of 1927, ch. 509, § 3, 44 Stat. 1426.

The work of hammering out the respective jurisdictions of the state and federal systems continued during the next four decades. By 1972, three jurisdictional spheres of coverage had emerged. *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 719 (1980). Concurrent federal and state remedies were available for maritime injuries that were also of "local concern" (*Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114, 126

gress sought to expand the Act's scope; it wanted to remedy the coverage anomaly that limited longshore and harbor workers to recovering LHWCA benefits for work-related injuries sustained on navigable waters and left those who sustained similar injuries on the adjoining land without an LHWCA remedy.[7] See. S. Rep. No. 1125, 92d Cong., 2d Sess. 1, 12-13 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 10-11 (1972); *Perini*, 459 U.S. at 306-312;

(1962)), while federal remedies alone were available for maritime injuries that were not "local" in character (*Jensen, supra*). Finally, workers injured landward of the *Jensen* line—beyond the water's edge—were consigned to the varying remedies provided by state workers' compensation laws. As to these workers, the Court explicitly invited the Congress to intervene once again, observing that "[t]here is much to be said for uniform treatment of longshoremen irrespective of whether they were performing their duties upon the navigable waters • • • or whether they were performing those same duties on a pier." *Director, OWCP* v. *Perini North River Assocs.*, 459 U.S. 297, 316 (1983) (describing the Court's statement in *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 219 (1969)). In 1972, Congress responded to the invitation. See *Perini*, 459 U.S. at 316.

[7] The amendments changed the Act in another major respect as well. As a quid pro quo for the expansion of coverage under the Act, Congress eliminated circumvention of the LHWCA compensation system through resort to an action for unseaworthiness. *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 724 (1980); see S. Rep. No. 1125, 92d Cong., 2d Sess. 1-2, 5-12 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 1-8 (1972); *Perini*, 459 U.S. at 313; *Northeast Marine Terminal*, 432 U.S. at 260-261. Prior to the 1972 amendments, a longshoreman or related worker could bring an unseaworthiness action against a ship owner for injury incurred on board the ship, and could do so even if the condition causing the injury had been the fault of the longshoreman or his or her employer. See, *e.g.*, *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946). The shipowner could then recover the damages paid to the worker from that worker's employer under theories of express or implicit warranty of workmanlike performance. See, *e.g.*, *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

Northeast Marine Terminal, 432 U.S. at 256-265; *Pfeiffer*, 444 U.S. at 72-73.

Congress effected the coverage change through two specific amendatory clauses. First, it modified the Act's "situs" requirement, expanding the definition of "navigable waters" under Section 3(a), 33 U.S.C. 903(a), to include " 'any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.' " *Northeast Marine Terminal*, 432 U.S. at 263. Second, Congress added a new "status" requirement to Section 2(3), 33 U.S.C. 902(3), in order "to describe affirmatively the class of workers [it] desired to compensate." *Northeast Marine Terminal*, 432 U.S. at 264. Under the amended status test, LHWCA coverage extends to injured workers "engaged in maritime employment," including specifically "any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker." 33 U.S.C. 902(3).

Congress did not define "maritime employment," "longshoreman," or "longshoring operations" in either the Act or its legislative history. See *Northeast Marine Terminal*, 432 U.S. at 265.[8] Nor is coverage limited in any

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[8] The Committee reports accompanying the Act posit only a single "typical example" of the new status requirement: workers unloading cargo from a ship or checking it as it is unloaded are to be covered, while those picking it up for transshipment inland, or performing "purely clerical" functions not directly involved with the loading or unloading process, are not to be covered. S. Rep. No. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 11 (1972); *Northeast Marine Terminal*, 432 U.S. at 266, 267. The example is useful in identifying the outer bounds of coverage, but it clearly "does not speak to all situations." *Id.* at 267.

case to the explicitly enumerated categories (like "longshoreman" and "ship repairman") that appear in the section. See S. Rep. No. 1125, *supra*, at 13; H.R. Rep. No. 1441, *supra*, at 10; *Perini*, 459 U.S. at 318 n.27. Rather, the broad language of the status test itself suggests that the courts should take "an expansive view of [its] extended coverage." *Northeast Marine Terminal*, 432 U.S. at 268.

The remedial purpose of the statute reflected in the legislative history further supports an expansive view of the Act's coverage. *Northeast Marine Terminal*, 432 U.S. at 268, citing *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953). As chronicled by this Court (see 432 U.S. at 268-273), Congress decided to extend the coverage of the Act shoreward because of two main concerns. First, the fact that pre-1972 benefits under the LHWCA applied only to those workers injured over navigable waters led to a significant "disparity in benefits payable * * * for the same type of injury depending on which side of the water's edge and in which State the accident occurs." S. Rep. No. 1125, *supra*, at 12; H.R. Rep. No. 1441, *supra*, at 10. Moreover, the disparity between federal benefits and generally lower state benefits promised to widen after the passage of the federal benefit reforms contained in the 1972 amendments. S. Rep. No. 1125, *supra*, at 12-13; H.R. Rep. No. 1441, *supra*, at 10; *Pfeiffer*, 444 U.S. at 83; *Northeast Marine Terminal*, 432 U.S. at 262. Second, Congress recognized that the realities of modern shipping practices, including containerization and other technological innovations, had moved onto the land much of the longshoring work it wished to protect. S. Rep. No. 1125, *supra*, at 13; H.R. Rep. No. 1441, *supra*, at 10; *Northeast Marine Terminal*, 432 U.S. at 270.[9]

[9] The magnitude of the change in the longshoring industry effected by containerization alone, and the difficulties that change engenders

These concerns support a construction of the Act's landward coverage that focuses on the occupations of those the Act seeks to protect rather than the "fortuitous circumstance" of where injuries occur (S. Rep. No. 1125, *supra*, at 13; H.R. Rep. No. 1441, *supra*, at 10; see *Pfeiffer*, 444 U.S. at 78-84; *Northeast Marine Terminal*, 432 U.S. at 272-273), and that makes allowance for changing technology (see *Northeast Marine Terminal*, 432 U.S. at 269-271). As this Court has articulated the functional approach of the status provision, all employees "involved in the essential elements of loading and unloading" meet the status requirement of the Act; employees are excluded only if they are " '*not* engaged in the overall process of loading or unloading.' " *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 423 (1985) (quoting *Northeast Marine Terminal*, 432 U.S. at 267 (emphasis added)). Coverage thus extends to any worker "responsible for some portion of" the loading and unloading activity since he or she is "as much an integral part of the process * * * as a person who participates in the entire process." *Pfeiffer*, 444 U.S. at 82-83.[10]

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when it is necessary to identify "longshoring tasks," have been documented by this Court. See *NLRB* v. *International Longshoremen's Ass'n*, 447 U.S. 490 (1980) (concerning appropriate focus of work preservation agreement in longshoring industry under National Labor Relations Act).

[10] The expansion effected by the 1972 amendments is particularly telling for purposes of this case because it targeted not only inadequate state compensation systems, but tort liability remedies as well. Congress made the decision to expand its federal workers' compensation system after giving "the most careful consideration" to a report prepared by the National Commission on State Workmen's Compensation Laws. H.R. Rep. No. 1441, *supra*, at 2; S. Rep. No. 1125, *supra*, at 2; see *Report of the National Commission on State Workmen's Compensation Laws*, (Washington D.C., July 31, 1972) [hereafter *Report on Comp. Laws*]. The report compared state com-

2. In 1984, Congress further amended the status provision.[11] Both the specifics of the change and the reasoning behind it confirm that the landward scope of the status provision should be defined broadly to include employees like respondents.

First, Congress addressed the status of certain limited categories of employees more tenuously connected to maritime work than those involved here, but who had been considered by the courts to be covered by the Act. Specifically, it removed from coverage "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work"; those working for a club, restaurant, museum, or other recreational or retail establishment; those employed by a marina (including "routine maintenance" workers, but not con-

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pensation systems to those providing remedies through actions for negligence. It found that a modern workers' compensation system could provide broad coverage through liability without fault, substantial protection against interruption of income, and assured provision of medical services, while "[e]mployees excluded from coverage are forced to fall back on liability suits, a drawn-out, costly, and uncertain process that was dismissed long-ago as a means of dealing with occupational injuries and diseases." *Report on Comp. Laws* 35, 45; see generally *id.* at 25, 119-120. Thus, the Commission endorsed as an ultimate objective "universal mandatory coverage" of workers under compensation systems. *Id.* at 44. And, in order to further that goal, the Commission recommended, *inter alia*, "that the term 'employee' be defined as broadly as possible." *Id.* at 48. Congress, in turn, noted that "the provisions in [the 1972 amendments] are fully consistent with the recommendation of the National Commission • • • [and the bill] will provide an adequate, prompt, and equitable system of compensation." S. Rep. No. 1125, *supra*, at 2.

[11] The 1984 amendments and their history are directly relevant to the instant case involving respondent Goode, who was injured on February 11, 1985. 88-127 Br. in Opp. 7. They are also relevant to the cases involving respondents McGlone and Schwalb, insofar as they clarify the intent of the 1972 amendments. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969). See also note 14, *infra*.

struction or repair workers); and employees of vendors, suppliers, or transporters only temporarily on the premises of a maritime employer.[12] In fashioning these categories, Congress deliberately declined to remove employees engaged in "maintenance[] or repair of gear or equipment" from coverage of the Act: although the bill (S. 1182, 97th Cong., 1st Sess. (1981)) that became the basis for the 1984 amendment contained such an exclusion, the idea died in committee. Compare S. 1182 as introduced, 127 Cong. Rec. 9829 (1981), with S. Rep. No. 498, 97th Cong., 2d Sess. 2 (1982).[13]

Further, Congress made clear that even the exclusions it delineated "are intended to be narrowly construed." H.R. Rep. No. 570, 98th Cong., 1st Sess. 5 (1983). And, it provided that workers within the named categories are excluded *only* if they are eligible for state workers' compensation programs. 33 U.S.C. 902(3) (Supp. IV 1986).[14]

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[12] Congress also exempted from the Act aquaculture workers and, for unrelated reasons, employees building, repairing, or dismantling small, recreational vessels. See H.R. Rep. No. 570, 98th Cong., 1st Sess. 6 (1983); S. Rep. No. 81, 98th Cong., 1st Sess. 26-28 (1983).

[13] The proposed bill also contained an exclusion for "railcar loading and unloading." 127 Cong. Rec. 9829 (1981). The exclusion similarly did not leave committee. See. S. Rep. No. 498, 97th Cong., 2d Sess. 2 (1982).

[14] While emphasizing the limited nature of the new exclusions, Congress simultaneously was at pains to disclaim that its exclusions implied coverage (or noncoverage) for other groups. Although the Conference Report does not repeat the refrain, the Senate Report emphasizes that:

> It is the committee's intention that these amendments not be interpreted to enlarge the present scope of the act's coverage. * * * [I]t is obvious that a large body of decisional law relative to traditional maritime employers and harbor workers remains undisturbed. [A] decision not to evaluate, endorse, or reject, explicitly or implicitly, the lower court and agency decisions in these

The reason Congress fashioned the specific exclusion it did in 1984 is also indicative of the scope of coverage under the Act. Congress sought "to reaffirm the purposes of the 1972 jurisdictional changes, and in that light • • • [to exclude] certain fairly identifiable employers and em-

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other areas was made deliberately by the Committee in conjunction with the limited changes that are being made.

S. Rep. No. 81, 98th Cong., 1st Sess. 26 (1983); see also, *e.g.*, 129 Cong. Rec. 16255 (1983) (remarks of Sen. Hatch); 130 Cong. Rec. 25,902 (1984) (remarks of Rep. Miller); 130 Cong. Rec. 8325 (1984) (explanation of House amendment).

While Congress's actions in 1984 must therefore be viewed with some caution, they indicate at the least that Congress considers the plain language of the status provision sufficiently broad to include those written out of the Act in 1984—because their exclusion from coverage under the status provision becomes effective only if those same workers are covered under state acts. In the words of the House Report, workers not protected by state programs would "*remain* under the coverage of the Longshore Act." H.R. Rep. No. 570, 98th Cong., 1st Sess. 5 (1983) (emphasis added); see also S. Rep. No. 81, *supra*, at 18; 130 Cong. Rec. 8324 (1984) (remarks of Rep. Erlenborn) (amendments "carve out" areas); *id.* at 8325 (explanation of House amendment) (legislation recognizes that employees "now covered" by Act may have duties with only attenuated relationship to maritime employment).

Moreover, it is relevant that Congress could reach "no political consensus" to disturb the judicial interpretation of the status provision that had developed by 1984. 130 Cong. Rec. S11,623 (daily ed. Sept. 20, 1984) (remarks of Sen. Hatch). If anything, Congress indicated its acceptance of "the limits of jurisdiction [that] ha[d] begun to emerge out of the judicial process." S. Rep. No. 81, *supra*, at 25; see also 130 Cong. Rec. S11,622 (daily ed. Sept. 20, 1984) (remarks of Sen. Hatch) (courts' interpretation of LHWCA in many instances "in keeping" with congressional intent although sometimes "clearly out of bounds"); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). By 1984, the courts of appeals had consistently interpreted the coverage of the LHWCA to include maintenance and repair workers who facilitated the loading process. See note 21, *infra* (citing cases).

ployees" who, although at work on a covered situs, lack "a sufficient nexus to maritime navigation and commerce." S. Rep. No. 81, 98th Cong., 1st Sess. 25 (1983). Specifically, Congress determined whether employees had "a sufficient nexus" to things maritime by looking to either "the nature of the work which they do, or the nature of the hazards to which they are exposed." H.R. Rep. No. 570, *supra*, at 4.[15] In turn, it analyzed the "nature of the work" done in terms that confirm the broad, functional approach employed by the federal judiciary since 1972. See, *e.g.*, S. Rep. No. 81, *supra*, at 30 (excluding employees temporarily on premises because their duties were "not an integral part" of traditional maritime employment); 130 Cong. Rec. 25,903 (1984) (remarks of Rep. Miller) (coverage focuses on "substance and purpose of the work being performed as integral to overall longshore operations"); cf. H.R. Rep. No. 570, *supra*, at 3-4 (employing functional approach). Congress's consideration of the "nature of the hazards" affecting workers additionally supports coverage of workers facilitating a loading process, because they are subject to the same harbor-side risks as those actually handling cargo.[16] Cf. H.R. Rep. No. 570, *supra*, at 3 (noting that clericals confined to office work were ex-

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[15] See also H.R. Rep. No. 570, *supra*, at 3; 130 Cong. Rec. 8322 (1984) (remarks of Rep. Miller); 130 Cong. Rec. S11,622 (daily ed. Sept. 20, 1984) (remarks of Sen. Hatch); 130 Cong. Rec. 25,902 (1984) (remarks of Rep. Miller).

[16] This Court's determination in *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 425 (1985), that the hazards faced by an employee were relevant only to the situs inquiry, not to the status provision of the Act, was made on the basis of the language and history of the 1972 amendments alone, and in the context of an employee whose work was wholly unrelated to the loading and unloading process. See note 27, *infra*.

cluded from coverage, while those who perform clerical duties on piers or in warehouses were included).[17]

In short, both the language of the status provision and the purposes expressed by Congress in 1972 and 1984 support an expansive approach to the landward coverage of the LHWCA, rather than the restrictive standard applied by the Supreme Court of Virginia.

B. The State Court's Standard Conflicts With The Principles Of Coverage Enunciated By This Court And Followed By The Lower Federal Courts And The Benefits Review Board

1. In *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, this Court first determined the reach of LHWCA coverage under the status provision of the 1972 amendments. The case involved two employees, a "checker" (the worker responsible for checking and recording cargo as it is loaded or unloaded) and a longshoreman who at the time of injury was working as a "terminal laborer" helping to load already-discharged cargo into consignees' trucks.

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[17] Congress also acted in 1984 for a simpler end: it sought to stem the litigation generated by the 1972 status provision. S. Rep. No. 81, *supra*, at 24-25. Several members of Congress indicated their belief that the litigation had been generated by the imprecision of the definition of covered employees. See, *e.g.*, 130 Cong. Rec. 8335 (1984) (remarks of Rep. Boggs); 130 Cong. Rec. S11,622 (daily ed. Sept. 20, 1984) (remarks of Sen. Hatch). Another member indicated that the litigation had been caused by "the failure [of courts] to recognize that covered longshoring workers "have traditionally engaged in a full range of activities respecting the handling of ocean cargo" and had job tasks (including, for example, the use of computers) that reflected the advent of modern technology. See 130 Cong. Rec. 25,903 (1984) (remarks of Rep. Miller). In either case, Congress's purpose to minimize litigation must enter the calculus of the Act's interpretation. That purpose will be most effectively served by a bright line definition that clearly protects all activity on the waterfront that is "integral to overall longshore operations." *Ibid.*

After reviewing the history of the LHWCA with attention to Congress's continued efforts to provide uniform coverage to "amphibious" workers (432 U.S. at 257, 271), the Court concluded that the Act's status provision should be broadly interpreted. The Court held that the "checker" satisfied the status requirement because, although his longshoring tasks had been somewhat changed by technology (the employee was checking the contents of a container on shore on the day of the accident), his work was "an integral part of the unloading process as altered by the advent of containerization." *Id.* at 271. The Court held that the terminal laborer also met the status requirement; since he spent some of his time in "indisputably longshoring operations" (*id.* at 273), the Act's "focus on occupations and its desire for uniformity" supported continuous coverage under the LHWCA (*id.* at 276).

The court explicitly rejected restrictions that would have artificially curtailed its approach. First, it denied that union membership should determine eligibility as a "longshoreman" under the Act, noting that "[t]he vagaries of union jurisdiction are unrelated to the purposes of the Act." *Northeast Marine Terminal*, 432 U.S. at 268 n.30. Second, the Court rejected a limitation not unlike that adopted by the Virginia court here. The Court held that the "point of rest" doctrine—according to which "stevedoring" was limited to loading or unloading operations seaward of the first "point of rest" on a pier or dock from which cargo is moved into vessels or removed for further transport ashore—was incompatible with the Act's objective of extending uniform coverage on an occupational basis. *Id.* at 275, 276.

This Court confirmed its expansive interpretation of the landward extension of coverage in *P.C. Pfeiffer* v. *Ford*, *supra*, where it found coverage for two workers, neither of

whom loaded or unloaded material directly to or from ships.[18] The Court rejected any resurrection of the artificial distinctions imposed by union labels or the point of rest theory (444 U.S. at 81-82) and also rejected the creation of similar restrictions by employer "assignment policies" (*id.* at 83). Rather, the Court focused on the "nature of the activity" to which a worker could be assigned: it noted that "[l]and-based workers who do not handle containerized cargo also may be engaged in loading, unloading, repairing, or building a vessel" because "[p]ersons moving cargo directly from ship to land transportation are engaged in maritime employment • • • [and one] responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process." *Id.* at 80, 82-93 (citation omitted); see also *Herb's Welding*, 470 U.S. at 423, 425 (injured worker not an employee under Section 2(3) because "[h]is work had nothing to do with the loading or unloading process, nor [was] there any indication that he was even employed in the *maintenance of equipment used in such tasks*") (emphasis added).

Consistently with the rationale of these decisions, the courts of appeals and the Benefits Review Board[19] uni-

[18] Ford was a "warehouseman" injured while fastening military vehicles (which had been unloaded from a vessel days before) to a railroad flatcar. Under union rules, he was prohibited from moving cargo either directly from a vessel to a point of rest in storage or to a railroad car, or directly from shoreside point of rest onto a vessel. *Pfeiffer*, 444 U.S. at 71. Bryant was a "cotton header" injured while unloading cotton from its land transport by wagon into a pier warehouse. His loading activities were limited by union rules similar to those applied to Ford. *Id.* at 71-72.

[19] The Benefits Review Board is charged under Section 21(b)(3) of the LHWCA, 33 U.S.C. 921(b)(3), with determining "appeals raising a substantial question of law or fact taken by any party in interest

formly view the question whether employees are engaged in "longshoring" by focusing on the nexus between a worker's actual duties and the overall process of loading and unloading cargo.[20] This approach takes into account the reality of conventional longshoring operations: maritime employment today is significantly affected by technology, job specialization, and the vagaries of union jurisdiction. Thus, although using slightly varying terms, the courts of appeals and the Board have extended coverage under the Act to any employee on a covered situs whose actual duties comprise an "essential element" or "integral part" of the overall loading and unloading process, even if those duties do not themselves including physically or mechanically loading or unloading maritime cargo. The standard applied by the courts of appeals,[21] and by the

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from decisions with respect to [benefit] claims of employees." Since the Board is not a policymaking agency, its interpretation of the LHWCA is not entitled to deference for that reason, see *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980), but the Board does serve as a specialized administrative appellate court in cases arising under the Act.

[20] The courts use the same approach in determining whether employees are "harbor-workers." See, *e.g.*, *Newport News Shipbuilding & Drydock Co.* v. *Graham*, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978).

[21] See, *e.g.*, *Harmon* v. *Baltimore & O.R.R.*, 741 F.2d 1398, 1404 (D.C. Cir. 1984) (railroad worker injured while repairing coal loading equipment is covered employee because his "functions were an integral part of the process of unloading and loading vessels and were vital to the movement of maritime cargo"); *Prolerized New England Co.* v. *Miller*, 691 F.2d 45, 47 (1st Cir. 1982) (worker performing maintenance of shiploading equipment plays "integral part" in loading process); *Sea-Land Services, Inc.* v. *Director, OWCP*, 685 F.2d 1121, 1123 (9th Cir. 1982) (LHWCA applies to mechanic responsible for repairing equipment used to load cargo onto ships and move it within terminal area because "repair and maintenance of equipment

Board,[22] specifically encompasses workers who, like re-

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necessary to loading and unloading ships is integral to the process and is therefore 'maritime employment' "); *Hullinghorst Indus., Inc.* v. *Carroll*, 650 F.2d 750, 755-756 (5th Cir. 1981) (carpenter building scaffolding for repairs to loading pier engaged in "maritime employment," since "the maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lies within the scope of 'maritime employment' " under the Act and such work is "an integral part • • •, an essential and indispensable step in the [pier] repairs to be effected"), cert. denied, 454 U.S. 1163 (1982); *Garvey Grain Co.* v. *Director, OWCP*, 639 F.2d 366, 370 (7th Cir. 1981) (millwright responsible for maintenance and repair of shiploading equipment is employee under LHWCA, since these "functions are an integral part of the loading and unloading" process and "are directly connected with and are vital to the movement of maritime cargo"); *Prolerized New England Co.* v. *Benefits Review Bd.*, 637 F.2d 30, 37 (1st Cir. 1980) (coverage extends to employee whose duties include shortening scrap steel for shipment because "[v]iewed in terms of this functional analysis • • • [the claimant's] repair, maintenance and occasional operation of the varied elements of Prolerized's integrated loading system qualify as peculiarly maritime services"), cert. denied, 452 U.S. 938 (1981); *Price* v. *Norfolk & W. Ry.*, 618 F.2d 1059, 1061 (4th Cir. 1980) (railroad worker injured while painting "gallery" used for loading grain into ships falls within LHWCA's ambit because "[t]he gallery, and its maintenance, are essential to the loading and unloading of all vessels"); see also 4 A. Larson, *Larson's Workmen's Compensation Law* §§ 89.45(b), 89.45(e), 89.45(f), 89.49 (1989) (citing cases).

[22] See, *e.g.*, *Powell* v. *International Transp. Services*, 18 Ben. Rev. Bd. Serv. (MB) 82, 84 (1986) ("vessel planning and stowage coordinator" is employee under the LHWCA because his "duties planning the loading and unloading of cargo," though clerical, "are integral to the longshoring process and as such are peculiarly maritime"); *Wuellet* v. *Scappoose Sand & Gravel Co.*, 18 Ben. Rev. Bd. Serv. (MB) 108, 110-111 (1986) (welder/mechanic injured while repairing conveyor belt at barge loading facility is covered under LHWCA since "the repair of equipment at employer's barge facility is an integral part of the loading process • • • and therefore is a maritime activity"); *Verderane* v. *Jacksonville Shipyards, Inc.*, 20 Ben. Rev. Bd. Serv.

spondents, engage in cleaning, maintenance, and repair of equipment used to load ships.[23]

2. In holding that respondents were not employees under the LHWCA, the Supreme Court of Virginia expressly rejected the courts of appeals' functional test and adhered, instead, to its earlier decision in *White* v. *Norfolk & W. Ry.*, *supra*. J.A. 26-27. *White* limited coverage under the Act to those employees having a " 'realistically significant relationship' to 'traditional maritime activity involving navigation and commerce on navigable waters.' " 217 Va. at 832, 232 S.E.2d at 812 (quoting *Weyerhaeuser Co.* v.

(MB) 62, 64 (1984) (manager of shipyard's Medical, Safety and Security Department, whose duties required inspecting certain shipbuilding equipment and assuring compliance with safety regulations, was covered employee since he "performed an integral role in assuring" shipyard workers' safety and his duties "were important to the overall progress of maritime construction"); *Bennett* v. *Mason Terminals, Inc.*, 14 Ben. Rev. Bd. Serv. (MB) 526, 528-529 (1981) (workers refurbishing containers satisfy LHWCA's status requirement as their "work [is] essential to the continued use of containers and thus is integral to longshoring operations"; benefits precluded here, however, because workers were not employed on a covered situs); *De Robertis* v. *Oceanic Container Serv., Inc.*, 14 Ben. Rev. Bd. Serv. (MB) 284, 287-288 (1981) (container repairmen, even if "not personally involved in loading and unloading cargo from ships" are nonetheless covered employees under the LHWCA, because "they maintained and repaired equipment used in longshoring operations" and "[t]heir work was an 'integral part' of, or 'necessary ingredient' in, longshoring operations," citing *Cabezas* v. *Oceanic Container Serv., Inc.*, 11 Ben. Rev. Bd. Serv. (MB) 279, 285-286 (1979)); see also 4 A. Larson, *supra*, §§ 89.45(b), 89.45(e), 89.45(f), 89.49 (citing cases).

[23] The treatise writers agree that an expansive approach to coverage under the Act is appropriate. See 1 M. Norris, *The Law of Maritime Personal Injuries 3rd* 128 (Supp. 1988); 4 A. Larson, *supra*, § 89.42(a), at 16-261 (rejecting, in discussion concerning "point of rest" theory, semantic distinctions excluding from coverage worker "whose entire function is associated with the movement of goods within the terminal").

Gilmore, 528 F.2d at 961).[24] The *White* decision makes clear that the Supreme Court of Virginia views the "realistically significant relationship" test as requiring direct involvement in the physical process of loading and unloading cargo. Thus, although White's duties required him to maintain electrical equipment essential to the coal loading process, the court concluded that he lacked the requisite relationship to the loading of cargo, because he was "not actually handling any cargo, either manually or mechanically," and "was not manipulating * * * any of the controls of the electrical mechanism, which furnished the power for this automated loading process." 217 Va. at 832-833, 232 S.E.2d at 813. Applying *White*, the court concluded here that respondents Schwalb and McGlone were not statutory employees because they also were not actually " 'engaged in the handling of cargo' " (J.A. 25), notwithstanding that failure to clean trash coal from the rollers and belts would halt the loading process (J.A. 21) and that only the "vagaries of union jurisdiction"—specifically, union agreements covering various groups of workers at the terminal—prohibited Schwalb and McGlone from placing the coal back on the belts (*ibid.*).[25] The court applied its narrow approach again when it ruled

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[24] The Supreme Court of Virginia's continued reliance on *Weyerhaeuser Co.* v. *Gilmore* is misplaced. The Ninth Circuit has made it clear that it reads *Weyerhaeuser's* "realistically significant relationship" language to mean that "repair and maintenance of equipment necessary to loading and unloading ships is integral to the process and is therefore 'maritime employment' covered by the Act." *Sea-Land Service, Inc.*, 685 F.2d at 1123. Thus, the Ninth Circuit applies its *Weyerhaeuser* formulation in harmony with authority in the other federal circuits.

[25] But for the union contracts that prohibited them from placing the trash coal that they had cleared away back on the conveyor belts, Schwalb and McGlone indubitably would have done so.

that respondent Goode was not an employee under the Act, although Goode's duties consisted largely of maintenance and repair of machinery and equipment used exclusively for coal loading in a terminal where loading apparently is almost entirely automated (see J.A. 35).[26]

The Supreme Court of Virginia's apparent conclusion that *Northeast Marine Terminal* and *Pfeiffer* established the outer limits of coverage is inappropriate. As this Court

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[26] Goode makes an unpersuasive argument that the state court's exclusion of him from LHWCA coverage is not at odds with the overwhelming weight of federal case law because, until the "unloading process had been completed, the coal was still in land transportation and was not in the process of being loaded aboard a ship." 88-127 Br. in Opp. 20-21. The circuit court specifically found that "the process of loading the coal into vessels begins" once the rail cars leave the barney yard (J.A. 35), and Goode has not even suggested that this finding should be set aside. Additionally, although the decision of the Fourth Circuit in *Conti* v. *Norfolk & W. Ry.*, 566 F.2d 890 (1977) (brakemen injured at Lambert's Point were not employees under the LHWCA) supports Goode's argument, we agree with the observation of the Court of Appeals for the District of Columbia Circuit that the Fourth Circuit has "moved away from using the distinction between 'traditional railroading tasks' and 'traditional maritime tasks' as the sole inquiry, or the dispositive issue in LHWCA cases." *Harmon*, 741 F.2d at 1104 (citing *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037, 1050 (4th Cir. 1980) (*Conti* cited only for "integral part" language); *Price, supra* (drawing no *Conti*-like distinction between "traditional railroading" as opposed to "traditional maritime" tasks), and *Vogelsang* v. *Western Maryland Ry.*, 670 F.2d 1347, 1348 (4th Cir. 1982) (distinguishing *Conti*)). This and other courts have, of course, found railroad workers covered by the LHWCA despite the parallel coverage of the FELA. See, *e.g.*, *Pennsylvania R.R.* v. *O'Rourke*, 344 U.S. 334 (1953); *Harmon, supra*; *Vogelsang, supra*; *Price, supra*; cf. *Powell* v. *Cargill, Inc.*, 444 U.S. 987 (1979) (vacating and remanding for reconsideration in light of *Pfeiffer, supra*, lower court's exclusion from coverage of employee whose "work was more oriented to the rails than to the sea" (573 F.2d 561, 564 (1978), withdrawn after remand, 625 F.2d 330 (9th Cir. 1980)). In such circumstances LHWCA coverage is exclusive under 33 U.S.C. 905.

has noted, the claimants in those cases were " 'engaged in longshoring operations,' " and the Court "had no occasion * * * to determine other possible applications of the status test to activities performed on the expanded landward situs." *Perini*, 459 U.S. at 318 n.27. Thus, the Virginia court read the "essential elements" and "overall processes" language in *Northeast Marine Terminal* and *Pfeiffer* in far too cramped a manner (J.A. 25-26), giving no effect to the directive in those cases that the Act's coverage be viewed expansively, and making no accommodation for the impact of modern technology on cargo handling techniques, for the high degree of job specialization, or for the extent of unionization within the longshore industry.[27]

Nor is the line drawn by the Virginia court rendered more palatable by the fact that it may, in some circumstances, relegate employees to a tort, rather than a state workers' compensation remedy. Congress deliberately chose to extend federal workers' compensation because of the advantages specific to that system. See note 10, *supra*; S. Rep. No. 1125, *supra*, at 2 (noting necessity for compensation system to ensure employer responsibility for unsafe conditions in high-risk industry, and consistency of 1972 amendments with recommendations by National Commission on State Workmen's Compensation); H.R. Rep. No. 1441, *supra*, at 2-3 (similar); see also *Nogueira*,

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[27] To the extent that the state court relied on *Herb's Welding, Inc. v. Gray*, *supra*, its reliance is misplaced. See J.A. 26. The employment at issue in that case—off-shore drilling—was not maritime, and the claimant, a welder on an oil rig, had "nothing to do with the loading or unloading process" and was not "even employed in the maintenance of equipment used in such tasks." 470 U.S. at 425. By contrast, petitioners' terminal operations are uncontestably maritime in nature, and the respondents plainly were "employed in the maintenance of equipment used to [load and unload cargo]."

281 U.S. at 136 (Congress that enacted LHWCA "distinctly recognized" the importance of the policy of compensation acts, and their advantages in providing for appropriate compensation in the case of injury or death of employees without regard to the fault of the employer"); *Pennsylvania R.R.* v. *O'Rourke*, 344 U.S. 334, 337 (1953) (LHWCA chosen as compensation act instead of employers' liability statute so as to bring admiralty law into harmony "with modern concepts of the duty of an employer although without fault to carry the burden of industrial accidents").[28]

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[28] The advantages offered by a workers' compensation system, as opposed to a system of tort liability such as the FELA, have repeatedly been recognized by this Court and by others. See, *e.g.*, *Parker* v. *Motor Boat Sales*, 314 U.S. 244, 249 (1941) (discussing congressional purpose to extend "modern principle of compensation" by enacting LHWCA) (quoting S. Rep. No. 973, 69th Cong., 1st Sess. 16 (1926)); *Urie* v. *Thompson*, 337 U.S. 163, 196-197 (1949) (Frankfurter, J., concurring in part) (describing concept of negligence as "antiquated and uncivilized basis for working out rights and duties for disabilities and deaths inevitably due to the conduct of modern industry"); *Wilkerson* v. *McCarthy*, 336 U.S. 53, 65 (1949) (Frankfurter, J., concurring) (describing concept of negligence in FELA cases as an "outmoded • • • working principle for the adjustments of injuries inevitable under the technological circumstances of modern industry," and as a "cruel and wasteful mode" of dealing with injuries that has "long been displaced in industry generally by the insurance principle that underlies workmen's compensation laws"); cf. *Calbeck*, 370 U.S. at 121-122 (noting, while reviewing disadvantages of jurisdictional confusion in LHWCA cases, that Act's framers meant "to assure the existence of a compensation remedy for every • • • injury, without leaving employees at the mercy of the uncertainty, expense, and delay of fighting out [results] in litigation").

Larson notes in his treatise that the FELA, while considered a great step forward as a method of handling work injuries in 1908, had, by 1912, already begun to receive unfavorable comparison with non-fault compensation acts beginning to appear in the States. See 4 A. Larson,

C. The Department Of Labor's View On The Scope of LHWCA Coverage Is Entitled To Deference

The Supreme Court of Virginia's restrictive construction of landward coverage under the LHWCA also conflicts with the expansive interpretation of the Section 2(3) status requirement that the Department of Labor has consistently applied since 1972 in administering the LHWCA workers' compensation program. Under the Department's interpretation, respondents would be considered employees under Section 2(3) because their work was directly related to the equipment used to load cargo. See Office of Workers' Compensation Programs, Employment Standards Admin., U.S. Dep't of Labor, *LHWCA Program Memorandum No. 58, Guidelines for Determination of Coverage of Claims Under Amended Longshoremen's Act* 8-9 (Aug. 10, 1977) ("Longshoring operations may be regarded as all operations necessary to the transfer of cargo between land and water modes of transportation which are performed by workers associated with that transfer rather than with the transportation itself. The test is essentially quite simple: was the injured worker employed in the waterfront cargo-handling industry, in work directly related to the cargo or to the equipment or premises used to handle it? If so, the worker had 'employee' status under § 2(3)."); *Northeast Marine Terminal*, 432 U.S. at 272 (Director's view is that " '[m]aritime

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supra, § 91.74, at 16-481; see also *id.* at § 91.76 (observing that the debate about the continued vitality of the FELA generally assumes that the negligence principle is an "anachronism" in the handling of workplace injuries, but continues because of failure of non-fault systems to meet objectives); *Report on Comp. Laws* 25, 45, 119-120 (criticizing tort liability suits as method of workers' compensation because determination of negligence by litigation expensive, leaves some workers without protection for injury, crowds court dockets, delays payment, and may deter successful rehabilitation).

employment * * * include[s] all physical tasks performed on the waterfront, and particularly those tasks necessary to transfer cargo between land and water transportation' ").

The Department's interpretation of the Section 2(3) status requirement is "based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Thus, it is entitled to deference and should be given effect.[29]

CONCLUSION

The judgments of the Supreme Court of Virginia should be reversed.

Respectfully submitted.

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[29] See, *e.g.*, *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. 624, 635 (1983) (consistent practice of those charged with enforcement and interpretation of LHWCA entitled to deference); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978) (great deference due interpretation of officers or agency administering statute); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969) (construction of statute by those charged with executing it should be followed "unless there are compelling indications that it is wrong").

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